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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 181

ROBERT H. MCNEILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 1a–15a)[1] are reported at 27 T. C. 899. The opinion of the Court of Appeals (R. 16a–21a) is reported at 251 F. 2d 863.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1958 (R. 21a), and the order denying petitioner's timely petition for rehearing (R. 22a–33a) was entered on March 17, 1958 (R. 33a–34a). The time for filing a petition for a writ of certiorari

[1] Record references are to petitioner's appendix to the petition for a writ of certiorari.

was extended to July 16, 1958, and this petition was filed on July 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, on the facts of this case, the two courts below were correct in finding that petitioner was not in the real estate business during the years in issue, and that the property in question was not held primarily for sale to customers in the ordinary course of the taxpayer's trade or business at the time of its sale, with the consequence that the loss from the sale of such property was not an ordinary loss but a capital loss limited by Sections 23 (g) and 117 (d) (2) of the Internal Revenue Code of 1939, as amended.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

This case involves a deficiency in federal income tax for the year 1946.[2] The facts may be summarized as follows:

The property in question is the Wopsononock property, consisting of 834 acres, located near Altoona, Pennsylvania. Petitioner had advanced funds to a contractor who was constructing a railroad across the

[2] A deficiency for the year 1947 was also involved in the courts below. This deficiency was due to the Commissioner's disallowance of the claimed business bad debts. Both the Tax Court and the Court of Appeals sustained the Commissioner's determination that these debts were non-business bad debts. The petitioner does not attack here the courts' decisions regarding this bad debt question.

land and had guaranteed payment of a mortgage placed on the property by the contractor. When the mortgagor defaulted, petitioner acquired the property at a foreclosure sale, in November, 1924, to protect himself from loss on the mortgage. He intended to develop and subdivide the land, and sell the lots to the public either at auction or through separate sales transactions. Petitioner engaged experienced engineers to survey the property and prepare plats. He repeatedly advertised for the sale of the lots, and employed a prominent realtor in the community to solicit sales of the property, and made extensive efforts over a period of several years to sell the lots. All such efforts were completely unsuccessful. (R. 2a–3a, 17a.)

At a cost of $3,000, petitioner built a road through the forest to the top of the plateau where the lots held for sale were located. Attempts were made to construct an airport project within the area and the expenses in this connection amounted to $2,500. Petitioner also attempted to interest the State of Pennsylvania in developing a public park on the land. These attempts were unsuccessful. (R. 3a, 17a.)

In 1940, the Commissioners of Blair County, Pennsylvania, seized 458 acres (of the 834 acres) of the property because of nonpayment of realty taxes. Title to the property seized was retained by the Commissioners of Blair County for two and a half years while efforts were made by them to sell the property to a private owner after failing to dispose of the property to a public bidder for an amount equal to the unpaid taxes. After the property was seized for

nonpayment of realty taxes, petitioner continued his effort to sell all or part of the land since he retained a right of redemption. (R. 3a, 17a-18a.)

In 1942, title to the property was conveyed by the County Commissioners to the City of Altoona, Pennsylvania. The City of Altoona eventually offered to sell the property to petitioner and through his intervention, on December 5, 1946, title to the property was transferred from the City of Altoona directly to the Royal Village Corporation in consideration of $750, an amount less than the unpaid real estate taxes outstanding against the property. All of the capital stock of the Royal Village Corporation as of the date of sale, December 5, 1956, was held by petitioner and his family. (R. 3a–4a, 18a.)

At the time of the sale of the property to the Royal Village Corporation, petitioner's right of redemption expired. Petitioner thus lost his opportunity to recover his investment and, not having abandoned the property previously, he accepted this as the date of the realization of his loss. (R. 4a, 5a, 18a.)

While practicing law in Washington, D. C., petitioner participated in a number of real estate developments in Maryland, Virginia, District of Columbia and North Carolina. Occasionally, petitioner promoted and financed the construction of various buildings, including an office building in Washington, D. C. (R. 4a, 20a.) All of this activity occurred many years before the tax year in question. (R. 20a.) Petitioner has never held a real estate license. (R. 4a.)

Petitioner deducted $11,000 in his 1946 return as a loss arising from the abandonment of the property,

which he claimed was held by him primarily for sale to customers in the ordinary course of his trade or business. The Tax Court held that the loss was not deductible because it was prohibited by Section 24 (b) (1) (B) of the Internal Revenue Code of 1939 as having been incurred in a sale or exchange, directly or indirectly, between members of a family. (R. 4a, 6a, 12a.) The Tax Court also found that petitioner was not engaged in the real estate business during the years in issue, and that the property in question was not held by him primarily for sale to customers in the ordinary course of his trade or business at the time of its sale by the City of Altoona on December 5, 1946. (R. 5a, 6a, 7a.) The Court of Appeals reversed as to the applicability of Section 24 (b) (1) (B), but concluded (R. 19a–20) that the finding of the Tax Court, that petitioner was not engaged in the real estate business during the years in issue and that the property in question was not held by him primarily for sale to customers in the ordinary course of his business at the time of the tax sale in 1946, was not clearly erroneous. Therefore, the loss was a capital loss, deductible subject to the limitations of Section 117. A capital loss is deductible only to the extent of capital gains, plus the lesser of net income or $1,000.[3]

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[3] Section 117 (a) (1) includes in the definition of capital assets all property held by the taxpayer except, among other things, property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. This Wopsonock property, therefore, was a capital asset unless it was held by petitioner primarily for sale to customers in the ordinary course of his trade or business during the years in issue.

Sections 23 (g) and 117 (d) (2). Losses incurred in a trade or business are fully deductible. Section 23 (e) (1).

ARGUMENT

1. The courts below were correct in finding that petitioner did not hold the property primarily for sale to customers in the ordinary course of his trade or business during the years in issue. That determination is essentially one of fact turning upon the particular circumstances of this case and presents no adequate ground for a writ of certiorari.

Whether property is held primarily for sale to customers in the ordinary course of business is, as the lower courts have uniformly recognized, a question of fact on which only clear error can justify reversal of the fact-finding tribunal. See e. g. *Stockton Harbor Industrial Co.* v. *Commissioner*, 216 F. 2d 638 (C. A. 9th), certiorari denied, 349 U. S. 904; *Smith* v. *Dunn*, 224 F. 2d 353 (C. A. 5th); *Dougherty* v. *Commissioner*, 216 F. 2d 110 (C. A. 6th); *Dillon* v. *Commissioner*, 213 F. 2d 218 (C. A. 8th); *Home Co.* v. *Commissioner*, 212 F. 2d 637 (C. A. 10th). As the Court of Appeals observed (R. 20a):

> During the years immediately following the acquisition of the Pennsylvania property in 1924, the taxpayer made diligent efforts to sell the land in lots and may fairly be considered to have been engaged in the real estate business at that time; but after this period the operation ceased. The subsequent attempts to dispose of the land for a public park or an airport also came to an unsuccessful end in the late 20s or early 30s. The testimony of

of the taxpayer as to what he did thereafter is confined to the general statement that he tried to dispose of the property and is entirely consistent with the conclusion of the Tax Court that the project was a failure and the Taxpayer did not operate it as a business in 1946, when the loss was claimed. The taxpayer supplements his testimony on this point by referring to numerous activities by him in the real estate field in various localities in or adjacent to Washington and in neighboring states, but most of these transactions took place prior to 1930 and all of them occurred many years before the tax year in question.

The lower courts' appraisal of the particular facts here affords no basis for establishing a conflict with other Courts of Appeals or with the Tax Court. See e. g. *Phipps* v. *Commissioner*, 54 F. 2d 469 (C. A. 2d); *Chicago Title and Trust Co.* v. *United States*, 209 F. 2d 773 (C. A. 7th); *Dillon* v. *Commissioner*, 213 F. 2d 218 (C. A. 8th); *United States* v. *Robinson*, 129 F. 2d 297 (C. A. 5th); *Smith* v. *Dunn*, *supra*; *Morley* v. *Commissioner*, 8 T. C. 904. Each of these decisions necessarily hinged upon the particular set of facts presented. While there have been occasional intimations of divergence in emphasis (see *United States* v. *Robinson*, *supra*, p. 300), the variety of factual circumstances presented makes it impossible to perceive a clear line of irreconcilable difference in the legal standards applied.

2. Contrary to petitioner's contention, the courts below did not disregard his "unimpeached" (Pet. 21) testimony. The Court of Appeals (R. 20a) con-

sidered the testimony when it stated that petitioner's efforts to sell the land in lots following the acquisition of the property in 1924 may fairly be considered as evidence that petitioner "engaged in the real estate business at that time; but after this period the operation ceased." (R. 20a.) The subsequent attempts to dispose of the land for a public park or an airport also came to an unsuccessful end in the late '20s or early '30s. The petitioner's testimony as to what he did thereafter is confined to "the general statement that he tried to dispose of the property and is entirely consistent with the conclusion of the Tax Court that the project was a failure and Taxpayer did not operate it as a business in 1946, when the loss was claimed." (R. 20a.) In other words, the petitioner has failed to carry his burden of proof by showing here that the property involved was held primarily for sale to customers and by showing that he was conducting a real estate business at the time the property was taken over in 1940.[4]

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[4] It should be noted that Section 1237 of the Internal Revenue Code of 1954 formulates new and detailed rules to assist in determining whether and to what extent profit from sales of lots in a subdivision is to be treated as ordinary income or capital gain. Applicable to sales after December 31, 1953, this provision sharply diminishes the future importance of cases like the present one arising under the Internal Revenue Code of 1939.

CONCLUSION

The concurrent findings of both courts below are amply supported by the record and do not warrant further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; * * *

* * * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *

* * * * *

(d) [As amended by Sec. 150 (e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Limitation on Capital Losses.*—

* * * * *

(2) *Other taxpayers.*—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

72 Purdon's Pennsylvania Statutes Annotated (Permanent ed.):

SEC. 6105.1. *Right of redemption upon payment by installments*

In all cases where heretofore or hereafter real property shall have been or shall be purchased at any tax sale by any political subdivision, any person who was or is entitled under existing law to redeem such property shall have such right of redemption so long as the title thereto remains in said political subdivision upon the payment of the amount due thereon by installments in the manner hereinafter provided, whether or not the period during which the right of redemption existed shall have expired.

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